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E-FILED: October 15, 2009

**UNITED STATES BANKRUPTCY COURT**

**DISTRICT OF NEVADA**

<b>In Re:</b>	)	<b>Case No. BKS-09-17138-BAM</b>
	)	<b>Chapter 13</b>
	)	
	)	<b>Hearing Date: OST Requested</b>
Frank Fioritto,	)	<b>Hearing Time: OST Requested</b>
	)	
	)	
Debtor(s).	)	
	)	
	)	

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**MOTION TO DETERMINE HSBC BANK USA, NA'S VIOLATIONS FOR  
CONTEMPT OF COURT PURSUANT TO 11 U.S.C. SECTION 105 AND FRBP  
9011 AND REQUEST FOR PUNITVE DAMAGES, ATTORNEY'S FEES AND  
SANCTIONS**

COMES now the above named Debtor, by and through attorneys, Haines & Krieger, L.L.C., and hereby moves this Honorable Court for an Order awarding sanctions, punitive damages and attorney's fees to the debtor for HSBC BANK USA, National Association, as Trustee for Home Equity Loan Trust Series ACE 2005-HE5 (hereinafter "Creditor")'s contempt of a Court Order entered September 14, 2009 which failed to incorporate the Court's Oral rulings. This motion is based on the attached affidavits and Points and Authorities below.

## POINTS AND AUTHORITIES

### STATEMENT OF FACTS

1. On or about May 5, 2009, the debtor filed the instant chapter 13 bankruptcy, bearing docket number 09-17137.
2. Creditor was listed as a creditor in the above bankruptcy.
3. On or about July 30, 2009, Creditor filed for relief from stay to resume foreclosure on debtor's property located at 4432 Paseo El Rio Drive, Las Vegas, Nevada 89121.
4. On or about August 4, 2009, Debtor filed opposition to Creditor's relief from stay.
5. On September 1, 2009 at 1:30 PM hearing was held on Creditor's motion for relief. Debtor agreed not to prosecute opposition to Creditor's motion if Creditor agreed to renotice the Notice of Default as required under revised NRS 107 (as amended though Nevada Assembly Bill 149). In essence this compromise required Creditor to provide debtor with an opportunity to elect to mediate through Nevada's mediation program with Creditor with a goal of negotiating a loan modification. On this understanding the Court granted Creditor's motion for relief.
6. On September 14, 2009, Creditor obtained an Order on its Motion for Relief from stay.
7. On or about September 29, 2009, Creditor, in total disregard to the Court's oral Order (which should be considered implicitly contained in the entered order), and agreement with the debtor, mailed the Debtor a Notice of Trustee

Sale on the debtor's home located at 4432 Paseo El Rio Drive, Las Vegas, Nevada 89121. The sale is noticed to be held on October 21, 2009..

8. Creditor has willfully violated the Court's Order by failing to renotice a Notice of Default under NRS 107 (as amended through AB 149). This willful failure is sanctionable pursuant to 11 U.S.C. Section 105. See *In re Haque*, 395 B.R. 799 (Bankr. S.D. Fla., Oct. 28, 2008) (where the Court imposed \$95,000 in sanctions under 11 U.S.C. §105).

### **CONCLUSION**

WHEREFORE, Debtor requests that:

1. Creditor be directed to pay reasonable attorney's fees for Creditor's violations and misconduct;
2. Your Honor grant Debtor request for actual damages resulting from Creditor's contemptuous conduct.
3. Your Honor grant Debtor's request for punitive damages against and impose \$100,000 in sanctions against Creditor for its contempt of Court.
4. Enjoin Creditor from conducting a sale of the debtor's home on October 26, 2009 at 10:00 AM.
5. In the event Creditor conducts a sale of Debtor's property on October 26, 2009, convert this motion to an adversarial matter governed by FRBP 7001 et seq.
6. For such other and further relief which the Court deems just and proper.

Dated: October 15, 2009

/s/David Krieger, Esq.  
David Krieger, Esq.  
Attorney for Debtor(s)